IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER, Petitioner and Respondent, v. CITY OF HAYWARD, a municipal corporation; ADAM D. PEREZ, in his official capacity as Records Administrator, City of Hayward, California, Police Department; DIANE URBAN, in her official capacity as Chief of Police, City of Hayward, California; DOES 1-50, in their official capacity for the City of Hayward, Respondents and Appellants.	**No. A149328**

APPELLANTS' OPENING BRIEF

Alameda Superior Court Case No. RG15785743

Hon. Evelio Grillo

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION THREE	COURT OF APPEAL CASE NUMBER: A149328
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APPELLANT/ PETITIONER: City of Hayward, et al. RESPONDENT/ REAL PARTY IN INTEREST: National Lawyers Guild, San Francisco Bay Area Chapter	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): City of Hayward, et al.

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 25, 2017

Justin Nishioka
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Police body-cameras are in the news and a subject of public debate. This appeal joins the debate, asking a question that many have asked, but no appellate court has answered: Who should bear the cost of producing copies of police body-camera videos when they are requested under the Public Records Act ("PRA," Gov. Code §6250 *et seq.*)[1] Specifically, the sole issue raised by this appeal is whether the PRA--in particular, the cost-allocation provisions for electronic records in §6253.9(b)--allowed appellant City of Hayward ("City) to recoup from respondent National Lawyers Guild ("NLG") some of the considerable cost of producing hours of body-camera videos taken by City officers providing mutual aid at a large demonstration in Berkeley, California. NLG paid the total charge of **$3,247.47** under protest and received almost five hours of videos, but it petitioned for a writ of mandate to receive a refund, and the court mandated the refund of all but $1.00 for a blank DVD. The amount at issue is small, but the issue of the intended allocation of costs for electronic records under §6253.9(b) is large.

The facts are undisputed. Desiring to be transparent, City staff spent over 170 hours identifying, compiling, reviewing and redacting records in response to NLG's broad PRA request for eleven categories of records related to the Berkeley demonstration. City staff provided NLG with hundreds of responsive paper and text-based electronic

[1] Unless otherwise indicated, all statutory citations are to the PRA.

records (like e-mails), converting them all to a PDF format; and e-mailing the PDFs to NLG, as NLG had requested to avoid the copying costs authorized by the PRA. NLG was not charged anything for all this work, including the direct costs of duplicating the records as PDFs, a cost indisputably allowed by §6253(b).

But the 90 hours of police body-camera videos the City had retained from the Berkeley demonstration posed a problem for the City. The City did not question that the videos are public records under the PRA; in fact, the City asked NLG if they wanted the videos although they were not sought explicitly or implicitly in NLG's request. The problem was that, a review of the videos revealed they contained information that was exempt from disclosure under the PRA because of privacy or security concerns, and redacting the exempt portions would be a monumental task, requiring considerable City resources and time. NLG agreed to temporarily narrow their request to six hours, but redacting the six hours was still a big task, requiring staff to meticulously review the videos; separately mark the start-and-stop time of exempt audio and video; find a special software program to efficiently perform the redaction; and manually use this program. Just using the program for the initially requested six hours plus additional videos requested later took 35.3 hours. The $3247.47 charge includes only these 35 hours plus 4.9 hours for an IT specialist to locate and download the 90 hours of videos from the thousands of hours stored in the cloud.

The overall intent and the core meaning of the cost-bearing

provisions in §6253(b) and §6253.9(b) are also not disputed. Under §6253(b), agencies responding to PRA records requests must bear the bulk of the cost of producing copies of the records and can only require requesters to pay "fees covering direct costs of duplication, or a statutory fee if applicable." But §6253.9, which was added to the PRA in 2000 through AB2799 and which addresses only electronic records, recognizes the greater difficulties and costs of producing some electronic records. In light of this recognition, §6253.9(a)(2) provides that the "cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format," but §6253.9(b) then provides, "nothwithstanding" this limitation, "the requester shall bear the cost of producing a copy of the record, including . . . the cost of programming and ***computer services necessary to produce a copy of the record*** when… . (2) the request would require data compilation, ***extraction***, or programming to produce the record." (*Emphasis added.*)[2] That is, indisputably, the PRA distinguishes between paper and electronic records, requiring agencies to bear the cost of producing copies of paper records except for the "direct costs" of making the copies, but requiring requesters of electronic records to bear these direct costs and additional costs if "data compilation, extraction, or programming" is needed to produce copies of the records. The dispute is over the meaning of the word

[2] Hereafter, unless otherwise indicated, all emphasis in quotations is added and quotations omit emphasis in the original, citations, internal quotation marks and indications of editing of internal quotations.

"extraction" in §6253.9(b)(2).

The City maintains that the plain and commonsense meaning of "extraction" as "taking something out" encompasses both the removal of exempt portions from non-exempt records and the removal of non-exempt portions from exempt records, that is, it encompasses the redaction of the requested videos using a special software program for which the City billed NLG. Further, the City maintains that so construing "extraction" makes sense when §6253.9(b)(2) is read in the context of §6253.9 and the PRA as a whole and keeping the purpose of §6253.9 and the PRA in mind. Last, the City maintains that, were there any doubt as to the intended meaning of "extraction," the full legislative history of §6253.9, which the City has asked this Court to judicially notice, supports the City's construction as encompassing redaction of the requested videos.

However, NLG argued--and the court agreed for different reasons--that "extraction" in §6253.9(b)(2) encompasses only the removal of non-exempt data from an exempt electronic record in order to generate a new record. Neither NLG nor the court provide any good reason for so limiting the term "extraction." Quite simply, there is no reason to construe extraction as anything other than taking something out, whether what is taken out is disclosable or non-disclosable.

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STATEMENT OF FACTS

In December 2014, the Hayward Police Department ("HPD") provided mutual aid at a demonstration in Berkeley "protesting the deaths of Michael Brown and Eric Garner, which had received national attention and notoriety." (Joint Appendix ["JA"], vol I, tab 2, p. 6 [NLG Petition].)[2] Because the National Lawyers Guild ("NLG") "has questions about the conduct of the agencies providing mutual aid in connection with [such] demonstrations," about seven weeks later, NLG submitted a PRA request to the HPD seeking "written and electronic" records related to the HPD's response to, not only the Berkeley demonstration, but also "each demonstration from November 24, 2014, to the date of this request." (JA:I:6:76) The "Request" sought eleven categories of records, described generally and specifically, for each demonstration in this two-month period, including:

1) "all" HPD "communications" pertaining both to the HPD's provision of mutual aid and to each demonstration" (specifying, among other records in the latter category, "dispatch computer entries," dispatch logs," and "e-mails");

2) "all" individual officers' "logs, notes, or chronologies;"

3) "all" HPD "reports" (specifying, among other reports, "operations plans," "incident reports," and "supplemental reports"); and

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[2] Hereafter, the JA will be cited in the format, JA:I:2:6.

4) records identifying the officers who were in command and the officers, "if any," who approved use of "batons," "chemical agents" or "gas dispersal devices;" plus records "pertaining to the amount and nature" of these and "less lethal munitions" used and records otherwise "detailing" their use. (JA:I:6:76-78.)

The Request reminded the City of the PRA's deadlines, asked that all requested records be provided "without delay," suggesting records be provided as they "become available," and adding "if portions of the documents are exempt from disclosure, please provide the nonexempt portions." (*Id.* at 78, citing §6253.) The Request further asked that fees "normally applicable" to PRA requests be waived and that records in "electronic form" be e-mailed to avoid "copying costs," but offered to pay the "direct costs of copying" if copying was necessary (that is, the cost the PRA explicitly authorizes agencies to charge). (JA:I:5:78, citing §6253 & §6253.9.).

After receiving the Request, Adam Perez, the HPD's "Records Administrator" promptly began identifying and compiling responsive records with the assistance of HPD and City staff. (JA:I:9:242-244 [Perez Declaration].) Although Perez and "at least five HPD staff members" were "working diligently" on the Request, because of the "voluminous amount of separate and distinct records" requested, Perez determined the City would need additional time to respond. (*Id.* at 244.) About three weeks after the Request, and a few days after NLG submitted a new request for additional records, Perez informed NLG that due to the "voluminous nature" of the requests, responsive

documents would be produced "on a rolling basis . . . as they became available." (*Id.* at 244-245.)[3]

Before records became "available," Perez had to review them to see if any redactions of non-disclosable material needed to be made (such as "information concerning security measures, investigatory files that might compromise active investigations, privileged communications, medical files, information concerning minors"). (JA:I:9:245.) Focusing on written or text-based electronic records converted to writing (like reports and e-mails), Perez "read through and redacted over two hundred and twenty written documents" and then converted them to PDF format for e-mailing. (*Id.* at 245.) All the written or text-based records responsive to the Request were e-mailed to NLG within 45 days of the Request. (*Ibid.*) The City chose not to charge NLG any fee "for the time spent searching, reviewing, redacting, and converting these records to PDF format" or for the "direct cost" of duplicating documents in many formats into a PDF format--a cost that NLG had offered to pay and a charge the PRA allows. (*Ibid.*; JA:I:5:78, §6253(b).) Although the Request did not explicitly ask for body-camera videos, and although such videos are not encompassed by any of the eleven general categories or specified records in the Request, in the course of compiling responsive records, Perez identified HPD "body-worn-camera" or "BWC" videos as

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[3] The additional records requested were detailed records "related to less than lethal munitions" used during the Berkeley demonstration. (JA:I:9:244.)

potentially responsive to the Request. (JA:I:9:243.)[4] According to Nathaniel Roush, a City IT Manager responsible for the HPD BWC program, the City instituted a BWC program in 2014, and, since then, approximately 1000 hours of videos have been "generated per month." (JA:I:10:254 [Roush Declaration].) All these videos are stored through a "Digital Evidence Management System" specifically "Taser International Inc.'s *Evidence.com*," which is a "cloud" system using a password protected external website. (*Id.* at 253; JA:I:6:39-40 [Roush Deposition].) The standard process for storing the videos is that, when officers return to the station, they put their cameras into a "docking station" that automatically uploads all new footage into the *Evidence.com* system without any "logging-in" and without accessing the system. (JA:I:6:43-44.) The uploaded videos can later be downloaded onto CDs or DVDs by those with access, and some "selected" BWC footage is so downloaded and stored in the HPD property room "at the request" of "certain" staff, but it is not possible to download directly from the HPD body-cameras to a CD or DVD. (*Id.* at 42, 44-45.) As far as Roush knows, videos downloaded from *Evidence.com* are in MP4 format. (*Id.* at 50, 52-53.)

After Perez confirmed that HPD body-camera videos are

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[4] It appears the Request was not intended to include body-camera videos since it asked the City, "in anticipation of potential criminal and civil litigation," to preserve evidence relating to pertinent demonstrations including "all of the records that are requested above in our PRA request ***and*** all video or audio recordings of any kind." (JA:I:5:78.)

records covered by the PRA and that NLG wanted such videos although it had not asked for them, he asked Roush to compile the videos because he (Perez) "did not have access to" the *Evidence.com* database and had not "received the training to search and navigate through the *Evidence.com* system." (JA:I:9:243.) To assist Roush, Perez gave him the Request and a list of "cases, incidents, and keywords" which Roush used to formulate the method "to process" the search; Roush then performed 45 searches, yielding 141 videos, amounting to "roughly 90 hours of recorded BWC footage." (JA:I:10:48-50, 9:244.) Roush then reviewed these videos for accuracy, downloaded and burned them onto DVDs, which he provided to Perez. (JA:I:10:49-50.) Roush estimates it took him "about ten seconds" per search for the 45 searches, "about one minute and 45 seconds per video" to review the 141 videos, and "about 20 minutes" to review the DVDs to see if they were "downloaded and copied properly," for a total of about 4.9 hours on these tasks. (*Id.* at 50-51.)

Roush did not review any videos to determine if they included exempt or non-disclosable material as that is not his "area of expertise." (JA:I:6: 51-52.) He also could not have done any redacting on *Evidence.com* because that system "allows users to search, find, and review [stored videos] using various search tools," but, due to "technical limitations," does "not allow for the efficient redaction of BWC footage" and "third party software which specializes in audio/video editing is utilized for the extraction of confidential

audio/video BWC footage." (JA:I:10:254-255.)

After Perez received the 90 hours of body-camera videos, he reviewed them to determine if they contained material "exempt from disclosure [that] would need to be extracted from the footage." (JA:I:9:245.) Because he identified exempt audio and video content "such as, personal medical information and law enforcement tactical security measures," he "researched software tools" that could efficiently extract the content. (*Id.* at 245-246.) The City had never previously provided body-camera videos in response to a PRA request and had no appropriate editing software. (*Id.* at 246.) After locating, investigating, testing and rejecting several software programs, Perez determined a free program "called 'Windows Movie Maker' had most of the editing functions needed to prepare the BWC footage for public release." (*Id.* at 246-247.)

Even with this program, redacting the 90 hours of videos responsive to the Request would be a monumental task, requiring considerable City resources and time, so the City asked NLG to narrow the Request insofar it now included body-camera videos. (*Id.* at 247.) So asking is consistent with the PRA, which requires agencies to assist the public in making focused and effective requests, including providing "suggestions for overcoming any practical basis for denying access to the records or information sought." (§6253.1(a).)

After some back and forth, NLG agreed to narrow the Request "for now" to approximately six hours of video taken at the Berkeley demonstration by five different officers during three distinct time

frames. (JA:II:12:371-372; see also, JA:I:9:247; JA;I:2:7 [Petition, stating NLG "temporarily narrowed the request"].)[5] Perez then met again with Roush, who "navigated through the HPD's *Evidence. com* system" to locate the requested six hours of videos while Perez "reviewed and helped identify" the requested footage. (JA:I:9:247.) After this footage was downloaded and burned onto DVDs, Perez began the"tedious" process of redacting it. (*Ibid* .)

Perez described a multi-phase editing process. The "first step" was "reviewing all responsive video," marking previously identified sections "that were exempt from disclosure" and noting "the start and end time" of each section. (JA:I:9:248.) Similar electronic markers were then placed on the ‘‘audio content.’’ (*Ibid*.) The "second step . . . was to extract all audio" into a " separate audio file" in MP3 format. (*Ibid*.) The "third step" was "to extract all exempt video and audio portions" that had been identified in the first step using the Windows Movie Maker software; this step required uploading all video and audio portions that had to be edited onto a "storyboard" and then editing them by "using the ‘split’ function . . . to separate specific sections of the video." (*Ibid*.) This splitting was done first for all video portions and then all audio portions, using the notes Perez had made on the start and end of exempt portions, but Perez also had to listen to the audio to make sure he did not "inadvertently edit out

[5] By this time, NLG had obtained all the requested written and text-based records (JA:I:9:245) and, thus, was able to identify pertinent time periods and officers.

portions of audio that were not exempt from disclosure." (*Id.* at 249.) The "final step" was to combine the edited audio and video portions into a new finished product in MP4 format "using the 'Save Movie' function" and carefully "syncing" the video and audio so that "you don't get to a point in the video to where nothing matches verbally to what you see visually." (*Ibid*; JA:III:21:601-602 [Perez Deposition II]; see also, Perez Depositions I and II at JA:I:6:102-108, and JA:III:594-598, for more complete descriptions of the process.)

Perez calculated this editing process alone took approximately 35 hours. (JA:I:6:111, JA:I:9:249.) The total time he spent producing the body-camera videos was far greater and he spent additional time producing the responsive written and text-based documents; in fact, he calculated he "personally spent approximately 170 hours" responding to the Requests, including time spent "engaged in the search and identification of records, researching viable editing options, redacting documents, and compiling and extracting audio/video footage for this request." (JA:I:9:249.)

Although the City chose not to charge NLG for any of the costs it had incurred producing written and text-based records, records, including those costs that the City is authorized to charge by the PRA and that NLG had offered to pay, because of the significant amount of time necessarily spent by Perez on the body-camera videos, the City decided to determine the reasonable and authorized charges for the body-camera videos, in consultation with NLG. (JA:II:12:360-364 [Nishioka Declaration, Ex. 10, e-mail exchange between City and

NLG].) The City had never been asked to produce body-camera videos in response to a PRA request, but it looked at its fee schedule to see if they might be encompassed by an existing fee, and initially believed they might be considered "communication tapes," for which the charge is $103 per tape. (*Id.* at 364, 377 [Ex. 11, Fee Schedule].) It was soon apparent to both NLG and the City that the records sought were not "communication tapes." (*Id.* at 362.) After reviewing case law and the PRA, as NLG had suggested, the City determined it could and would charge NLG $2,939.58 for the requested videos, calculated using Roush's and Perez's hourly salary plus benefits and charging for 4.9 hours of Roush's time and 35.3 hours of Perez's time. (*Id.* at 364; JA:I:249.) The 4.9 hours of Roush's time does not include time formulating the search method and performing miscellaneous tasks, like burning the videos into DVDs and properly preserving the DVDs as potential evidence. (JA:I:6:48-49,10:255.) The 35.3 hours of Perez's time only includes the time doing the editing process on Windows Movie Maker; it does ***not*** include his time: collecting and compiling the videos; reviewing the initial 90 hours of videos briefly and the six hours in the narrowed Request more thoroughly (for a total of 45 to 50 hours); attempting to do the editing of the six hours of videos with available software; or the time spent researching viable software options. (JA:I:6:101-102, 104, 106; JA:I:9:247; JA:III:21:582-583.)

The City also agreed to make the redacted videos available for inspection free of charge. (JA:II:12:361.) After NLG had viewed the

videos at a "dual monitor work station" set up at the HPD, with a HPD staff member in attendance, NLG was given an invoice for the $2,939.58 cost of copies. (JA:I:9:250.) When NLG complained the charge was "excessive," the City agreed to a "reassessment" of its invoice, but determined the invoiced amount was correct. (*Id.* at 359, 356.)

Almost three months later, NLG paid the invoiced amount of $2939.58 "under protest" and was provided with copies of all the videos in the narrowed request; specifically, seven separate videos, in MP4 format, totaling 232 minutes were released, (JA:I:5:26 [NLG Declaration]; see also JA:I:8 [Petition].) Shortly after, NLG requested a second set of videos encompassing footage taken by 24 named officers plus any other HPD officers at the Berkeley demonstration in three more time periods. (JA:I:5:26-27, 9:250.) The City promptly edited the second set of videos using the same process as with the first set, made them available for free inspection, and offered to provide copies for $308.89. (JA:I:6:128-129, 9:250.)[6]

Without paying this invoiced amount, NLG filed the instant action, seeking a refund of the amount it paid for body-camera videos and for release of the second set of videos without payment. (JA:I:2.) But about two weeks later, NLG paid the invoiced amount for the second set of videos and was provided with two videos, in MP4 format, totaling 65 minutes. (JA:I:5:26-27.)

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[6] The decrease in the costs was because there were "less videos and less time length of videos." (JA:I:6:129.)

PROCEDURAL HISTORY

In September 2015, NLG filed a "Verified Petition for Declaratory and Injunctive Relief and Writ Of Mandate"("Petition"), alleging, *inter alia,* the City's charges for copies of the requested body-camera videos were "unauthorized" by the PRA, and seeking, *inter alia,* the refund of all unauthorized amounts that NLG had paid (JA:I:2.)[7]

After the City answered the Petition, essentially admitting all the ***facts*** alleged related to the City's charges for the requested body-camera videos (JA:I:3), and after limited discovery on the basis of these charges (see, e.g., Depositions at JA:I:6:35-71), NLG filed a motion for a peremptory writ of mandate ordering the City to refund all amounts NLG had paid for the requested body-camera videos in excess of the "direct costs of duplication." ("Motion," JA:I:4.)[8]

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[7] The Petition named the City, Perez and Diane Urban (the City's former police chief) as respondents, but Perez and Urban are named in their official capacities, the City has been and is continuing to represent them, and, thus, the three respondents/appellants are hereafter referred to collectively as the "City."

[8] The Motion (like the Petition) also sought declaratory and injunctive relief prohibiting the City from charging more than the direct costs of duplication for body-camera videos, but the Motion cited no authority for seeking such relief by such a motion, and the final order and judgment only grant the writ. (JA:III:28.) The Petition additionally sought a writ ordering the release of the second set of videos without payment of the invoiced amount, but, by the time of the Motion, NLG had paid for and received copies of both sets of videos, and, thus, the Motion only sought a refund. (JA:I:4:24.6,

After extensive briefing and submission of multiple supporting declarations, with numerous attached exhibits (JA:I:4-11; JA:II:12-17), in advance of the scheduled hearing on the Motion, the court issued an 18-page tentative order (JA:II:18), which "framed the analysis differently than the parties," and, thus, invited "short supplemental briefs" and "additional evidence" (JA:III:23:619-620). The parties accepted this invitation, another deposition of Perez was taken, and supplemental briefs with supporting declarations were submitted. (JA:II:19-21.)

In March 2016, the continued hearing on the motion was held. (JA:III:22; see also, Reporter's Transcript ["RT"].) In June 2016, the court issued a 31-page "Order Granting Petition for Writ of Mandate." ("Order," JA:III:23.) The court recognized that §6253.9 "is an exception to the general rule that a public entity may charge only for the direct cost of production" in that it provides "if public records are in electronic format, and if the request would require 'data compilation, extraction, or programming to produce the record' [citing §6253.9(b)(2)] then a public agency can charge for 'the cost of producing a copy of the record, including the cost to *construct* a record, **and the cost of programming and computer services necessary to produce a copy** of the record' [citing §6253.9(b)]." (*Id.* at 626, 628, *italics supplied by court, bold added.*) However, relying on the italicized term *"construct*" while ignoring the **bold "produce a**

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copy" following it, and also relying on a case dealing with paper records that was decided before §6253.9 was added to the PRA, the court concluded "as a matter of law" that the term "extraction" in §6253.9(b)(2) "does not refer to making a redacted version of an existing public record" or, stated differently, "the 'extraction' of electronic information from existing public records does not include the review and redaction of exempt or privileged material from such records," (*Id.* at 620, 634.)

Because the court concluded that §6253.9(b) did not authorize the City to charge NLG the costs incurred in producing the requested body-camera videos beyond the "direct cost of duplication", the court turned to the City's alternative argument that it could condition production of the requested body-camera videos on payment of the incurred costs based on §6255(a), which provides agencies may justify withholding a record by showing "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." The court agreed with the City that "the expense and inconvenience" of responding to a PRA request, "including the cost of redacting public records" may be considered in this weighing process, but concluded the City did not show the burden of responding to the Request "imposed an undue burden over and above the regular expected burden." (*Id.* at 620-621.)

Based on both conclusions, the Order grants the Petition and directs issuance of a writ mandating the City "refund to NLG all costs charged for the production of public records under the CPRA except

for the $1 charged for the DVD that contained the public records." (*Id.* at 649.)

As ordered, NLG submitted a proposed judgment and writ--plus an "application" to correct some factual errors in the Order and also to correct its statement "that the petition was filed under Code of Civil Procedure section 1085" rather than §6258 (providing any person may institute writ proceedings "to enforce his or her right to inspect or to receive a copy of any public record"). (JA:III:24:651.) The court denied this application, finding the factual errors to be "immaterial" typographical errors and concluding the Petition may have been brought "substantively under the CPRA, including Gov. Code 6258," but the Order "correctly" stated it was brought "procedurally under CCP 1085." (JA:III:658-659.)

The same day (July 21, 2016), the court signed a judgment and writ of mandate, both directing the City to "refund to NLG costs charged for the production of public records under the CPRA in the amount of three thousand two hundred forty-six dollars and forty seven cents ($3,246.47)." (JA:III:27:660-661 & 28:663.) Neither the judgment nor writ had any other substantive directions or orders. (*Ibid.*) On August 8, 2016**,** the City filed its notice of appeal. (JA:III:31.)

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STATEMENT OF APPEALABLITY

This is an appeal from a final judgment and order issuing a peremptory writ of mandate that resolved all issues between the parties and that is, thus, appealable pursuant to Code of Civil Procedure §904.1(a)(1). The PRA does not provide otherwise.

Ordinarily PRA cases are reviewable only by a writ pursuant to §6259(c), which provides:

> *"An order of the court,* ***either directing disclosure by a public official or supporting the decision of the public official refusing disclosure****, is not a final judgment or order within the meaning of Section 904.1 of the Code of Civil Procedure from which an appeal may be taken, but shall be immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.*"

But §6259(c) does not apply on its face because this case does not involve an order directing disclosure or supporting a decision of non-disclosure. The Order solely mandates the City to refund the amount that NLG was required to pay to obtain the body-camera videos it had requested.

That §6259(c) does not apply is shown by *North County Parents Organization For Children with Special Needs v. Department of Education* (1994) 23 Cal.App.4th 144 ("*North County*"), a case on which NLG extensively relied on the merits ***and also in support of the procedure it followed***. (See JA:I:4:24.10-12.) As NLG explained,

like this case, in *North County*, an agency required an organization pay various charges for a requested record and the organization paid the charge, but filed suit under the PRA seeking a refund. (*Id. at* 24.10.) The trial court ruled for the agency, the requester ***appealed***, and the Court of Appeal heard and decided the appeal. (*See*, *North County* at 147, 149.)[9]

NLG was presumably aware that *North County* involved an appeal; that would explain its application to correct the Order to refer to the PRA rather the Code of Civil Procedure §1085. (JA:III:24:651.) That gambit failed (JA:III:658-659) as should any attempt to now assert the City improperly appealed rather than seeking a writ. However, if this Court somehow decides that the judgment is not appealable, the City's appeal could be treated as a writ petition. (*Coronado Police Officer's Association v. Carroll* (2003) 106 Cal.App.4th 1001, 1006.) As in *Coronado*, the record contains all the requirements for an extraordinary writ and the notice of appeal was filed "within the statutory time period for seeking writ review." (*Ibid;* see JA:III:28, 29 & 31.)

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[9] See also *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, another case on which NLG relies, in which a police union sought an injunction to prevent release of the names of officers involved in shootings when PRA requests are made; the trial court denied the injunction; and the "denial was upheld *on* ***appeal.***" (*Id*. at 64.) Indeed, the superseded Court of Appeal opinion notes the union simultaneously filed a petition for a writ of mandate and a notice of appeal, but the Court "issued an order providing that the trial court's order was directly appealable" under Code Civ.Proc. §904.1(a)(6).

STANDARD OF REVIEW

As the trial court recognized, the issue in this case is the proper interpretation of the cost-bearing provision of §6253.9 and the application of that provision to the undisputed facts. Accordingly, the court exercised its "independent judgment" and decided "as a matter of law" that this provision did not encompass the City's undisputed costs of producing the requested body-camera videos. (JA:III:23:625, 620.)

This Court must also exercise its independent judgment and decide the proper interpretation of §6253.9 "on a de novo basis." (*Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 223.) Case after case has reiterated that the interpretation of the PRA and its application to undisputed facts is a question of law, subject to de novo review. (See, e.g., *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577, 588; *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 62; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750.)

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ARGUMENT

I. THE PRA DISTINGUISHES BETWEEN PAPER AND ELECTRONIC RECORDS, PROVIDING IN §6253 THAT REQUESTERS OF PAPER RECORDS MAY ONLY BE CHARGED THE "DIRECT COSTS OF DUPLICATION," BUT PROVIDING IN §6253.9 THAT REQUESTERS OF ELECTRONIC RECORDS MAY BE CHARGED ADDITIONAL COSTS IF "DATA COMPILATION, EXTRACTION, OR PROGRAMMING" IS NECESSARY TO PRODUCE THE RECORDS.

The PRA was enacted in 1968 for the purpose of providing the public with a broad right of access to government information. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1281.) Indeed, it begins with the Legislature's declaration "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (§6250.) This right was, moreover, "enshrined in the state Constitution," by Proposition 59 in 2004. (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 164 ["*Sierra Club*"], citing Cal.Const., Art.I, §(3)(b)(1).)

In furtherance of this right, PRA provides that public records must be "open to inspection at all times during the office hours" of public agencies. (§6253(a).) The PRA further broadly defines "public records" as any "writing" of a public agency "containing information relating to the conduct of the public's business . . . regardless of physical form" and then defines "writing" as including specified written, visual and electronic records plus "every other means of

recording upon any tangible thing any form of communication or representation." (§6252(e) & (g).) There is, thus, no dispute that police body-camera videos are public records covered by the PRA.

However, the right of access to public records "is not absolute." (*Copley Press* at 1282.) As this Court recognized, there is a "tension between the public's right to know and the equally important public interest in protecting citizens and public servants from unwarranted exposure of private matters." (*City of Richmond v. Superior Court* (1995) 32 Cal.App.4th 1430, 1433.) The Legislature acknowledged this "tension between privacy and disclosure," also declaring in §6250 that it was "mindful of the right of individuals to privacy." (*Ibid*.) This "express policy declaration at the beginning of the Act bespeaks legislative concern for individual privacy as well as disclosure." (*Copley Press* at 1282.) And Proposition 59 similarly expresses this concern, providing additional "assurance" that the "right of access is not meant to supersede or modify existing privacy rights." (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 366, citing Cal. Const., art. I, §3(b)(3).)

The PRA expressly protects privacy by setting forth "numerous" exemptions, "generally" involving documents or information "that for one reason or another should remain confidential." (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1182, citing §6254 [with subdivisions (a)-(z) & (aa)-(ad)]; see also, §§6254.1-6254.33 & §§6275 - 6276.48 [providing additional exemptions].) And, striking a balance between privacy and

disclosure, §6255(a) allows agencies to withhold any record if it shows "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

The balancing of privacy and disclosure is also reflected in §6253(a), which requires:

> *"Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law."*

"In other words, the fact that a public record may contain some confidential information does not justify withholding the entire document;" rather, if possible, the agency is required to redact the "exempt" parts and "produce the remainder." (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1336 ["*Santa Clara"*].)

Although the PRA's broad definition of public records encompasses paper and electronic records, and although the "format of information is not generally determinative" when applying the provisions of the PRA, a 2000 amendment to the PRA added §6253.9, which addresses only electronic records. (*Sierra Club* at 165, citing Stats.2000, ch. 982, "AB2799.") Subdivision (a) of §6253.9 provides that "any agency having information that constitutes an identifiable public record not exempt from disclosure . . . that is in an electronic format shall make that information available in an electronic format when requested," adding in subdivision (1) that the information

should be made available "in any electronic format in which [the agency] holds the information," and in subdivision (2) that an agency must "provide a copy of an electronic record in the format requested" if that format "is one that has been used by the agency to create copies for its own use or for provision to other agencies."

Subdivision (b) of §6253.9 addresses the costs of providing the record, drawing the distinction between paper and electronic records at issue in this case. To understand the distinction, it must be understood that: "Generally speaking, an agency may recover only the direct cost of duplicating a record." (*Santa Clara, supra*, 170 Cal.App.4th at 1336, citing §6253(b)) Specifically, §6253(b) provides:

> *"upon a request for a copy of records that reasonably describes an identifiable record or records, [each agency] shall make the records promptly available to any person upon payment of fees covering* ***direct costs of duplication****, or a statutory fee if applicable."*

This language has been interpreted to limit the amount agencies can recover, limiting recoupment to direct costs. These direct costs have been interpreted "to cover the cost of running the copy machine, and conceivably also the expense of the person operating it while excluding any charge for the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted." (*Santa Clara* at 1336, citing *North County, supra*, 23 Cal.App.4th at 148; *accord*, *Fredericks, supra*, 233 Cal.App.4th at

236.) However, as *Fredericks* explains, *North County* dealt with paper records, and since *North County* was decided in 1994, AB2799 added §6253.9 to the PRA, with a new "costs provision" that "has permitted allocation of additional costs for production of information in an electronic format." (*Id.* at 219, 236, citing §6253.9(b).)

As added by AB2799, §6253.9(a)(2) clarifies that "the cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format." But §6253.9(b), also as added by AB2799, "allows an agency to recover specified ancillary costs" beyond the direct cost of duplication when the greater burden of producing a copy of an electronic record warrants asking the requester to bear the additional costs. (*Santa Clara* at 1336.) In full, subdivision (b) provides:

> *"Notwithstanding paragraph (2) of subdivision (a),* ***the requester shall bear the cost of producing a copy of the record****,* ***including*** *the cost to construct a record, and* ***the cost of*** *programming and* ***computer services necessary to produce a copy of the record when*** *either of the following applies:*
>
> *(1) In order to comply with the provisions of subdivision (a), the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.*
>
> *(2)* ***The request would require data compilation,***

extraction, or programming to produce the record."

In short, as *Santa Clara* and *Fredericks* both make clear, *North County* remains the law for ***paper records***, but it has limited application to ***electronic records*****.** For electronic records, agencies are ***not*** limited to charging the direct cost of duplication if producing a copy requires "data compilation, extraction, or programming," and may "recover specified ancillary costs," including costs not allowed in *North County*, like the cost of redaction. (*Fredericks* at 237; *Santa Clara* at 1336.)

Because producing the body-camera videos requested by NLG required the City to extract exempt material using a specialized computer program, after reviewing §6253.9(b), the City determined it was permitted to charge NLG for some of its costs, including the cost of redaction. The City was correct.

II. RELYING ON SECTION §6253.9(b), THE CITY PROPERLY CHARGED NLG THE COST OF THE "COMPUTER SERVICES" NECESSARY TO PRODUCE THE REQUESTED BODY-CAMERA VIDEOS, INCLUDING THE COST OF REDACTING EXEMPT MATERIAL

To determine whether the City properly charged NLG for the cost of redacting the body-camera videos, it is necessary to construe §6253.9. Courts' "fundamental task" when construing a statute "is to determine the Legislature's intent so as to effectuate the law's purpose." (*Sierra Club, supra,* 57 Cal.4th at 165.) To accomplish this task, courts "first examine the statutory language, giving it a plain and

commonsense meaning," but not examining it "in isolation;" rather, statutory language must be examined "in the context of the entire statute and the statutory scheme of which it is a part." (*Id.* at 165-166.) Keeping in mind the goal of determining the language's "scope and purpose," courts should "harmonize the various parts of the enactment" and "give significance to every word, phrase, sentence, and part of an act." (*Ibid.*) The plain meaning should prevail, but if it is not plain or would lead to "absurd" and unintended consequences, "courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*)

In the context of public records, these rules of statutory construction are supplemented by the mandate that a law "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal.Const., art.I, §3(b)(2).) This "constitutional canon" requires courts to interpret the PRA "in a way that maximizes the public's access to information unless the Legislature has expressly provided to the contrary." (*Sierra Club, supra,* 57 Cal.4th at 175.) But, contrary to NLG's argument, a requirement that those seeking public records must bear some costs of producing the records does not necessarily limit access; indeed, it may maximize access by encouraging more disclosures. (See *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1451-1452 [rejecting the argument that there must be a "narrow construction of the costs that may be recouped" under Gov. Code §27366, which allows counties to set fees "to recover the

direct and indirect costs" of providing copies of records].)

Whether §6253.9(b) is narrowly or broadly construed, there is no dispute that the Legislature meant exactly what it said in the section: that is, "the requester" of an electronic record may be required to "bear the cost of . . . computer services necessary to produce a copy of the record" when producing it requires "data compilation, extraction, or programming." The dispute lies in what the Legislature meant by "extraction." Applying the rules of statutory construction, "extraction" must be construed, as the City construed it, to encompass the removal of non-disclosable material from body-camera videos. There is simply no basis or reason for construing "extraction" as limited to the removal of disclosable material from non-disclosable records, as NLG and the court would have it.

A. The term "extraction" in §6253.9(b)(2) encompasses removal of non-disclosable material from disclosable records as well as removal of disclosable material from non-disclosable records

"[C]ourts appropriately refer to the dictionary definition to ascertain the ordinary, usual meaning of a word." (*County of Stanislaus, supra*, 246 Cal.App.4th at 1451.) Here, there is no dispute as to the dictionary definition of "extraction." The City and NLG agree that "extraction" means the act of taking something out, "especially using effort or force" or, put differently, the process of getting, pulling, or drawing something out, "usually with special effort, skill, or force." (JA:I:08:224 [City Ps.&As]; JA:I:4:24.13

[NLG Ps.&As].) The court also agreed that "extraction" means "to extract something, as . . . a selection from a writing or discourse." (JA:IIII:23:629.) It is difficult to imagine how these definitions would not encompass redacting videos to remove non-disclosable sounds and images. The plain meaning of "extraction" perfectly aligns with the City's process to produce the requested body-camera videos: The City pulled out exempt portions from six hours of videos through a multi-step process, requiring many staff hours and specialized computer software.

Construing the term "extraction" to encompass the redaction of videos is not only consistent with the term's plain meaning; this construction also effectuates the purpose of §6253.9(b) and makes sense when §6253.9(b) read in the context of §6253.9 and the PRA as a whole. The PRA is designed to balance public access and privacy, providing for both wide disclosure and multiple exemptions. (*City of Richmond, supra*, 32 Cal.App.4th at 1433.) It also furthers both access and privacy by requiring disclosure of "reasonably segregable" portions of requested records "after deletion of the portions that are exempted by law." (§6253(a).) Clearly, "deletion" in this context means extraction of non-disclosable material from disclosable records--exactly what the City did with the requested body-camera videos.

Doing this extraction--or the converse extraction of non-exempt material from exempt records--imposes "a tangible burden" on agencies. (*Northern Cal. Police Practices Project v. Craig* (1979) 90

Cal.App.3d 116, 124.) But nothing in the PRA "suggest[s] that a records request must impose no burden on the government agency." (*Fredericks, supra*, 233 Cal.App.4th at 237.) To the contrary, "an agency may be forced to bear a tangible burden in complying with the [PRA]" (*Connell v. Superior Court* (1997) 56 Cal.App.4th 601,615-616.) Public agencies are not, however, required to bear an undue burden. (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452-453.)

Generally, for paper or text-based electronic records, the segregation process does not impose an undue burden on agencies, whether it involves extracting exempt portions from non-exempt records or non-exempt portions from exempt records. Hence, §6253(b) provides agencies must bear this cost and all other costs involved in producing the record except the "direct costs of duplication" which must be borne by the requester under §6253(b) and §6253.9(a)(2). (*North County, supra* 23 Cal.App.4th at 147; *Santa Clara, supra*, 170 Cal.App.4th at 1336.) However, as this case shows, the segregation process for some electronic records, like videos, can be quite burdensome--far more burdensome than simply taking a black pen to non-disclosable material, like social security numbers, in a paper record. (See, §6254.29 [providing "local agencies shall redact social security numbers from records before disclosing them to the public"].) It is reasonable to construe §6253.9(b) as intended to relieve this undue burden by requiring the requester to bear the additional costs involved in producing some electronic

records, including the cost of "extraction" to comply with the segregation requirement in §6253(a)--whether the extraction is of disclosable material from a record made exempt by §6254(a)-(ad) and §§6254.1-6254.33 or is redaction of material made exempt by these sections from a disclosable record.

Either way, requiring the requester to bear this additional cost would serve the interests of both privacy and disclosure. Rather than trying to withhold electronic records because the cost of redacting private information would be great or disclosing the records without redacting the private information because of this cost, agencies should willingly and fully comply with the segregation requirement of §6253(a), knowing their costs could be recouped. *Fredericks* explains that, should "redaction" of the electronic records requested in that case be necessary because of "significant confidentiality concerns" in §6254(f)(2), and should the "fiscal burdens" of this redaction be unreasonable, rather than a court allowing withholding the records because of this burden, §6253.9(b) allows the court to "condition disclosure upon an additional imposition of fees and costs, over and above the direct costs of duplication." (*supra*, 238 Cal.App.4th at 238.)

Allowing agencies to so recoup their costs redacting police body-camera videos is essential. Police body-camera videos may contain invaluable "information relating to the conduct of the public's business" (§6252(e)). As the ACLU explained in a 2013 policy statement, while the ACLU has opposed many forms of video

surveillance,

> *"police on-body cameras are different because of their potential to serve as a check against the abuse of power by police officers. Historically, there was no documentary evidence of most encounters between police officers and the public, and due to the volatile nature of those encounters, this often resulted in radically divergent accounts of incidents. Cameras have the potential to be a win-win, helping protect the public against police misconduct, and at the same time helping protect police against false accusations of abuse.*" (JA:II:12:431.)

However, some jurisdictions may choose not to implement body-camera programs because of the fiscal burden of producing the videos for public inspection, and several jurisdictions around the country have denied or limited public access to these videos precisely because of this cost. (See JA:I:8:216-217 [citing Exs. 1-7 to City Declaration at JA:II:12:284-340].) Much of this burden is the cost of redaction to remove private and exempt information. (*Ibid* [citing Exs. 5-7, see, in particular, JA:II:12:323, Seattle Police Department statement that the "painstaking redaction process" for body-camera videos "takes a significant amount of time," explaining a "simple redaction in a one minute video can take specialists upward of half an hour, whereas more complicated edits--like blurring multiple faces or pieces of audio- can take much, much longer"].)

Alternatively, instead of denying public access to police body-camera videos because of the cost of redaction, agencies may not properly edit videos, failing to preserve individual privacy in situations where privacy is needed most. As the ACLU policy statement on body cameras states, compared to other video surveillance,

> *"Body cameras have more of a potential to invade privacy [as] [p]olice officers enter people's homes and encounter bystanders, suspects, and victims in a wide variety of sometimes stressful and extreme situations."* (JA:II:12:431.)

Hence, "[f]or the ACLU, the challenge of on-officer cameras is the tension between their potential to invade privacy and their strong benefit in promoting police accountability." (*Ibid.*) To resolve that tension, the ACLU proposed "[r]edaction of video records should be used when feasible" and that "[i]f recordings are redacted, they should be disclosable." (*Id.* at 435.) The ACLU statement does not address who should bear the cost of this redaction, but requiring the requester of the videos to bear the cost--as the plain language of §6253.9(b) allows--could go a long way towards resolving that tension.

Of course, some electronic records are not as costly and burdensome to produce as body-camera videos; it may be no more burdensome to produce copies of some electronic records than it is to produce copies of paper records, and redaction of some electronic records may be no more difficult than redacting paper records. When

that is the case, and when copies of electronic records are requested in a format "used by the agency to create copies for its own use or for provision to other agencies," the "cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format." (§6253.9(a)(2).) But, "***[n]otwithstanding paragraph (2) of subdivision (a)***," requesters of electronic records may be required to bear the cost of "computer services necessary to produce a ***copy*** of the record" if "data compilation, ***extraction***, or programming" is required. (§6253.9(b).) In other words, reading §6253.9(a) and §6253.9(b) together, if an agency is required to do work well beyond simple duplication--if laborious or technical work is required--the costs are to be borne by the requestor.

In sum, given the undisputed plain and commonsense meaning of "extraction" and considering the term in context and in light of the purpose of the PRA, a reasonable construction of "extraction" encompasses the redaction of exempt material from body-camera videos before producing requested copies. Nevertheless, NLG argued and the court agreed (but for different reasons) that "extraction" only encompasses removing non-exempt material from exempt records. There is no reason or basis for so restricting the term "extraction."

1. NLG is mistaken that "extraction" is limited to extraction of non-exempt "data" from exempt records

As well as can be understood, NLG argued below that the term "extraction" in §6253.9(2)(b) cannot be construed to encompass the

City's work redacting the requested videos because §6253.9(b) "addresses electronic *data*, which is plainly different from an electronic *record*," and the Legislature only "intended to allow additional charges when the public records request requires pulling data out of an electronic database in order to generate a record." (JA:I:4:24.13, *emphasis in original*.) In effect, NLG is mistakenly reading the phrase "data compilation, extraction, ***or*** programming" in §6253.9(b)(2) as "data compilation, ***data*** extraction, ***and*** programming," and then limiting "data extraction" to pulling out data for the purpose of creating a new record. There is no reason to so rewrite or to so limit §6253.9(b)(2), and there are at least three good reasons for rejecting this rewrite and limitation.

First, NLG reasoned that the Legislature "underscored the distinction between data and records" in §6253(c)(4), which sets forth as one of the extenuating circumstances allowing agencies to extend the 10-day deadline for responding to PRA requests "the need to extract data." (JA:I:4:24.13-14.) But §6253(c) instead underscores that "extraction" in §6253.9(b)(2) should ***not*** be construed as limited to "data extraction." It provides that the deadline may be extended because of the "need to ***compile data***, to write programming language or a computer program, ***or to construct a computer report to extract data.***" That is, when the Legislature meant "extract data" it said "extract data." And when it meant data had to be pulled out of a non-disclosable electronic database to generate a disclosable record, it said "extract data" in order to "construct a computer report." The

Legislature said nothing of the sort in §6253.9(b)(2). "Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statue or from its legislative history." (*Regents of the University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 3999, quoting *Trope v. Katz* (1995) 11 Cal.4th 274, 280). NLG attempted to do precisely this. Such an interpretation is improper.

Second, §6253.9(b)(2) sets forth three distinct tasks, separated not only by commas, but also by an "or." Because the first task of "data compilation" indisputably involves pulling data from one or more databases and compiling it into a new document, the second task of "extraction," with or without the modifier "data," must mean a distinct task, such as deleting exempt data from a non-exempt record before disclosing it in compliance with §6253(a). If "extraction" only meant "pulling data out of an electronic database in order to generate a record" as NLG would have it, the two tasks would be identical and there would be no need to state both or they would be separated by an "and," not an implied "or." Further, if the "data" in the first task of "data compilation" was also meant to modify the second task of "extraction," it also must modify the third task of "programming," but "data programming" makes no sense.

Last, as defined by NLG, "[d]ata is bits of information" while "a record is 'a writing' in tangible form." (JA:I:4:24.13, citing §6252(g).) But §6252(e) defines a "public record" as "any writing containing ***information*** relating to the conduct of the public's

business … regardless of physical form or characteristics." And multiple PRA sections make clear that certain kinds of information in the form of "***data***" are exempt and must be redacted to protect privacy. (See, e.g., §6253.6 [exempting "***data*** that would reveal the identity" of individuals requesting bilingual ballots], §6254(e) [exempting "Geological and geophysical ***data,*** plant production ***data,*** and similar information" in certain reports]; §6254(g) [exempting certain "examination ***data***"] and §§6254(n), (o) & (x) [exempting certain "financial ***data***"].) In other words, even if §6253.9(b)(2) is read as providing only for "data extraction," it would be reasonably construed as encompassing redaction of non-disclosable data from disclosable electronic records. Indeed, the City's redaction of exempt "bits of information" from the videos could reasonably be seen as redaction of "data."

In sum, NLG provided no reason to construe "extraction" as limited to removing data from a non-exempt record and generating a new record. Although the court reasoned differently than NLG, it similarly provided no reason to so limit "extraction."

2. The trial court is mistaken that "extraction" is limited to removing non-exempt matter from exempt records to "construct" a new record with the removed matter.

The court rejects the City's plain and commonsense reading of "extraction" in §6253.9(b)(2) as, in the court's words, allowing agencies to charge "for the cost of redacting public records to 'extract' exempt information from the public records," saying "[t]his is not a reasonable interpretation." (JA:III:23:627, citing *Regents v. Superior*

Court, supra, 222 Cal.App.4th at 396-397.)[10] However, it is the court's limitation of "extraction" to the removal of non-exempt information from existing records to construct new records that is unreasonable--and plainly wrong.

The court's first mistake is its statement that, because §6253.9, "is expressly limited to 'an identifiable public record not exempt from disclosure'," its "concern" is "the production of non-exempt public records, which means ***complete public records with no redactions of exempt information***." (JA:III:23:627 [quoting §6253.9(a)].) But this express limitation has nothing do with redaction or whether records are "complete." Rather, it was intended to clarify that §6253.9 applied only "to electronic records already subject to disclosure under the PRA," thus, "preserving the [existing] exclusion for proprietary software" (*Sierra Club, supra,* 57 Cal. 4th at 174.) Moreover, records are not "exempt from disclosure" simply because they contain exempt information. Rather, if exempt portions of records are "reasonably segregable, the records must be disclosed "after deletion of the portions that are exempted." (§6253(a); see also, *Sierra Club* at 174, explaining some agencies objected to §6253.9, as initially proposed, because it "would require the electronic ***disclosure*** of massive databases," and that would require significant amounts of staff time to

[10] *Regents* not only does not address §6253.9(b)(2); it also stresses the importance of the plain meaning of statutory words and rejects an interpretation of §6252(e) inconsistent with its plain meaning. (*Id*. at 399-400.)

redact nondisclosable information.")[11] In other words, §6253.9 applies to records whether or not they have exempt portions, but exempt portions must be redacted before any disclosure.

Based on the misconception that §6253.9 only concerns "complete public records with no redactions," the court reasons that its "cost provisions" must not "concern time spent redacting exempt information from ***existing*** public records" and, thus, the §6253.9(b)(2) "exception" for requests that require "data compilation, extraction, or programming" applies "***only*** when a CPRA request requires a public agency ***to produce a record that does not exist***" by compiling, extracting or otherwise retrieving data "from an existing record." (JA:III:23:627-628.) The court is again mistaken. If §6253.9 applies only to "existing" and "identifiable" records as the court believes, it could not apply to requests for non-existent records, and the §6253.9(b)(2) exception for "extraction" is meaningless. And, putting aside this logical gap, nothing in the "text" of §6253.9(b)(2) "strongly suggests" or even hints that "extraction" is limited to extractions done to produce a non-existent record as the court claims. (*Id*. at 628.).

The court also claims language in the first paragraph of §6253.9(b) "strongly suggests" "extraction" is so limited. (JA:III:23:628.) The court is mistaken yet again. As the court states,

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[11] As will be shown below, on the basis of a partial legislative history, *Sierra Club* states it did "not appear" that any amendments were made in response to this objection (*ibid*), but the cost provision in §6253.9(b) was added to the bill precisely because of this concern and alleviated most of the objections.

this language provides agencies "can charge for 'the cost of producing a copy of the record, including the cost to *construct* a record, **and the cost of** programming and **computer services necessary to produce a copy of the record**'." (*Ibid, italics supplied by court, bold added.*) But the court is seizing on the word "construct" and ignoring the bold words when it mistakenly concludes this language means agencies "may require cost reimbursement" if extraction "is necessary 'to construct a record'," but it does not mean, if a PRA request is made "for an *existing* public record," agencies "may charge for information or data removed from that record." (*Ibid, italics supplied by court.*) Actually, the bold words in the above quotation from §6253.9(b) do mean just that. Put differently, reading §6253.9(b) and §6253.9(b)(2) together, and giving significance to every word in the sections, if removal of exempt matter is required to produce copies of requested records (as was the case here), and if special computer programs are required to remove the exempt matter (as was also the case here), agencies can charge the requester for the cost of removing this matter. This construction, unlike the court's construction, is consistent with the plain, commonsense meaning of "extraction."

The court acknowledges that "the plain and commonsense meanings of 'extraction' include 'to extract something,' as … 'a selection from a writing or discourse'." (JA:III:23:629 [quoting from a 1998 dictionary].) This precisely describes redaction. However, making yet another mistake, the court conflates the dictionary definitions of "compile" and "extract" and says that producing a record

"that did not exist previously by compiling from disparate sources or by extracting data from a source" would be data compilation or extraction with the meaning of §6253.9(b)(2), but an "agency's ***redaction and retention*** of exempt material from an existing public record, and subsequent production of that existing record ***without the exempt material included***, would involve neither the 'compilation' of information or the 'extraction" of information that was subsequently produced pursuant to the CPRA." (*Ibid.*) Put differently, the court is assuming that, because "data compilation" necessarily involves removal of data from existing records and producing what was removed as a new record, "extraction" must mean the same and cannot mean retention of what was removed. Nothing in the dictionary definitions of "extraction" and "compilation" suggests such a limitation on "extraction" and nothing suggests that the retention or non-retention of what is removed is significant. To the contrary, whether non-exempt matter is removed from records to compile into new records or exempt matter is removed to preclude its disclosure, the removed matter would necessarily be retained in the original records. But any exempt matter that is extracted would probably not be retained separately any more than one would retain a diseased tooth extracted from one's mouth or a thorn extracted from one foot. Nothing in the word "extraction" suggests retention.

More important, there is no reason to so conflate "data compilation" and "extraction." The court says, with no authority, that "when a group of actions are listed together [in a statute] they are

presumed to have a similar effect." (JA:III:23:629.)

But the phrase "data compilation, extraction, or programming" in §6253.9(b)(2) does not separate "data compilation" from "extraction" with an "and." Rather, the three actions are separated by an "or," indicating they are distinct. And reading "extraction" as essentially the same as "data compilation" renders one or the other superfluous.

The court makes two more mistakes in attempting to explain why extraction should be given its plain and common sense meaning and why it should be limted to extractions to produce new records. First, the court confusingly asserts that, because "public record" and "record" are used "interchangeably" in §6253.9, "data compilation, extraction, or programming to produce the record," refers "logically" to producing a new record, "not to the creation of a redacted version of a previously existing public record." (JA:III:23:630.) There is no logic in this assertion--especially because "public record" is used only once to clarify that information in an electronic format must be made available only if it "constitutes an identifiable public record not exempt from disclosure." (§6253.9(a).) Second, also confusingly, the court asserts that §6253(a), requiring that "reasonably segregable" portions of records be made available "after deletion of the portions that are exempted by law," suggests that removal or redaction of exempt information "is simply segregating exempt information," which suggests that "extraction" in §6253.9(b)(2) means "compiling information for production . . . and not the segregation of exempt information from a public record." (JA:III:23:630.) The court says

where "two clearly different words" are used "in the same statutory scheme," it is presumed they mean "two different things." (*Id.* at 630-631.) But §6253(a) uses "segregable" as an adjective and "deletion" as a verb in §6253(a), and it indisputably uses "deletion" as a synonym for "redaction"-- and also "extraction."

Finally, the reason for all these mistakes becomes clear. The court recognizes that §6253.9 addresses "issues particular to information in an electronic format" and that §6253.9(b) is "an exception to the general rule" that agencies may charge only the "direct costs of duplication." (JA:III:23:631, 625-626, citing §6253(b) and §6253.9(a)(2) for the "general rule.") Nevertheless the court construes §6253.9(b) as also limited to these costs. And, because the phrase "direct costs of duplication" in §6253(b) has been construed as not encompassing "ancillary tasks" like retrieving or redacting records, the court strains to construe §6253.9(b) as also not encompassing these tasks. (*Id.* at 625, 631-632, citing *North County, supra*, 23 Cal.App.4th at 147-148.) Indeed, the court states that allowing agencies to charge "for the costs related to the agency's 'extraction' of exempt information under §6253.9(b) would be contrary to the legislature's decision to limit charges to a public agency's 'direct costs of duplication,' and, thus, the "court will read the word 'extracting' consistent with the broader legislative scheme." (*Id.* at 631.) This is the court's fundamental mistake.

As has been explained *supra*, although *North County* indisputably remains the law on the meaning of "direct costs of

duplication," it dealt with paper records and was decided years before §6253.9(b) was enacted and added a new "costs provision" to the PRA for electronic records that permits "allocation of additional costs" beyond the direct costs of duplication and "ancillary" costs not encompassed by these direct costs when "data compilation, extraction, or programming" is required to produce new electronic records or copies of existing electronic records. (*Fredericks, supra*, 233 Cal.App.4th at 219, 236; see also *Santa Clara, supra*, 170 Cal.App.4th at 1336 [stating §6253.9(b) allows "agencies "to recover specified ancillary costs"].) Put differently, §6253.9(b) allows charges "for additional or ancillary costs of production of electronic records," if their production would require generation, compilation and ***redaction*** of information from confidential electronic records. (*Fredericks* at 238.) How then can the court construe §6253.9(b) as only allowing the "direct costs of duplication" and not the ancillary costs?

The court states there is "no indication" the Legislature intended that a public agency "could characterize its redactions of electronic documents as 'extractions' and thereby recover its costs of redacting exempt information," but a public agency could not similarly recover costs of redacting paper records "if the agency performs the redaction with a black felt marker." (JA:III:23:631.) But that is exactly what the Legislature intended when, as here, the redaction of electronic records is substantially more of a burden and more difficult than simply blacking out portions of paper records. The Legislature made this

clear by providing in §6253.9(a)(2) that, if producing a requested electronic record is a simple matter like redacting paper records, the "cost of duplication shall be limited to the direct cost of producing a copy," but then providing in §6253.9(b), "***[n]otwithstanding***" §6253.9(a)(2), "the requester shall bear . . . the cost of programming and computer services necessary to produce a copy of the record when . . . [t]he request would require data compilation, ***extraction***, or programming." In construing "extraction" as not including the kind of burdensome and difficult redaction performed by the City here and, thus, limiting the City to charging the "direct costs of duplication," the court is simply ignoring the "nothwithstanding" in §6253.9(b) as well as the clear distinction between paper and electronic records when it comes to the burden and difficulty of redaction, as the Legislature recognized in enacting §6253.9 and its "exception" to the general rule of cost allocation.[12]

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[12] The court looks to *North County* and to "analogous" statutory provisions" addressed in two cases. (JA:III:23:631-632.) But no statute is analogous and no case is helpful. Each case deals with paper records and has no bearing on the unique problems posed by electronic records that §6253.9 was enacted to address or considers the unique language of §6253.9(b)(2). *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229 Cal.App.4th 1043 is a CEQA case addressing the permissible charges when the petitioner elects to prepare the administrative record under Public Resources Code §21167.6(b)(2), but an agency needs to prepare a supplemental record. *Rubio v. Superior Court* (2016) 244 Cal.App.4th 459, deals with discovery by those sentenced to death or life without possibility of parole under Penal Code §1054.9.

B. The legislative history of §6253.9(b) shows that "extraction" was understood to have included "redaction."

The legislative history of "AB2799," which the City has asked this Court to judicially notice, not only shows that "extraction" in §6253.9(b)(2) was understood to encompass "redaction;" it also strongly suggests that §6253.9(b) was purposefully drafted to require requesters to bear the cost of redacting electronic records when, as here, redaction is substantially more burdensome than redacting paper records with a black marker.[13] In short, the legislative history reveals: 1) as originally introduced, AB2799 continued the existing limitation on cost recovery to "direct costs of duplication;" 2) there was opposition based on the cost and burden of "redacting" electronic records--with opponents often using that term; 3) after working with opponents, the author amended AB2799 to add §6253.9(b); and 4) after this amendment, all but one of the opponents withdrew their opposition, with the remaining opponent, along with several state agencies, still expressing concern about the burden of redacting electronic records.

AB2799 was introduced in February 2000. (LH:1.) As NLG observed below, its purpose was to increase access to public records by making them available in an electronic format, thus reducing the

[13] The complete legislative history obtained from the Legislative Intent Service, Inc. (in the order--or lack of order--in which it was received) is Exhibit B to the Declaration of Justin Nishioka in support of Appellants' Motion for Judicial Notice. It will be cited as LH:##. end footnote

cost and inconvenience of making paper copies of voluminous records. (JA:I:4:24.15 [citing two of four legislative history documents submitted as exhibits, now found at LH:170 & 311].) AB2799 proposed several controversial changes to existing law, but the initial opposition focused on a "reverse balancing" provision, which allowed disclosure of records if the public interest in disclosure outweighed the public interest in non-disclosure and which was rapidly deleted (LH:5, 10). After this deletion, various concerns remained, including that, because of the need to redact exempt information, producing some records in electronic format could be costly, burdensome and difficult (if not impossible). (See, e.g, LH:40, 71 [Com. Analyses, both stating that opponents "claim ***redacting*** the nondisclosable information from the electronic records could be a costly and time-consuming process"]; LH:97, 231: [L.A. Sheriff Letters, stating "***redacting*** information . . . which is confidential and not otherwise subject to disclosure" may be impossible]; LH:153 [San Bernardino Sheriff Letter, stating AB2799 "fails to address the ***redaction*** problems created by providing the data in an electronic format," adding no program currently exists with "the capability of extracting exempt records from releasable ones"]; LH:164, 266 [Com. Analyses, both stating "workload in ***redacting*** non-disclosable electronic records from disclosable records" was a "[p]otential cost"]; LH:195-196 [Republican Analysis, stating some electronic information "may not be for public consumption" and purging to "eliminate nondiscloseable records … could be a costly endeavor,"

with one opponent claiming that "***redacting*** (removing) the sensitive parts of records" may be impossible]; LH:230 [L.A. County Letter, stating some electronic records "would require special programming to provide information without jeopardizing employee privacy," and AB2799 "will increase substantially the cost of legal review, ***redaction*** and special programming"].)

The Legislature was also informed that, because there was no provision in AB2799 for agencies to recover the greater costs that could be incurred in producing electronic records, agencies could only recover the "direct costs of duplication", which has been interpreted to preclude recovery of many costs, including redaction costs. (See, e.g., LH:40, 71, 341 [Com. Analyses, stating "Opponents note that the bill does not contain a provision authorizing agencies to charge fees covering the cost of preparing the electronic record for public release]; LH:153 [San Bernardino Sheriff Letter, stating the bill "fails to address the actual cost to the public of ***redacting*** an electronic database," explaining "to ***redact*** the database, each record must be reviewed individually," but "costs for personnel to review the database are not currently reimbursable, only the cost of the copy of the file"]; LH:196 [Republican Analysis, stating opponents claim "that the costs of ***redacting*** exceed the amounts that legally they may charge for copies"]; LH:533 [Clerks etc. Letter, stating the bill allows recovery of the direct costs of duplication but that "does not include… costs associated with ***redaction*** of any information that is exempted or prohibited from disclosure"]; LH:308 [Analysis on Third Reading,

stating AB2799 "does not contain a provision authorizing agencies to charge fees covering the cost of preparing the electronic record for public release when such preparation is necessary"].)

The author "worked closely" with opponents and in June 2000, proposed an amendment to address their concerns about "the cost and feasibility of ***redacting*** public information." (LH:198 [Author's "Background Information"]; see also, LH:357 [Sponsor's Letter to Governor, stating "[a]fter lengthy negotiations," AB2799 "was amended to require the requester to bear the cost of producing a copy of an electronically held record"]; LH:211 [Clerks etc Letter, thanking author "for agreeing to amend the bill to address their concerns" about "costs incurred" producing electronic records]; LH:347 [Author's statement that opponents were concerned that Producing electronic records "would prove very costly to public agencies," and that to "help alleviate their concerns, I amended the bill to address the costs incurred by public agencies in providing copies of electronic records under circumstances now described in my bill."].) Notably, a week before the author's "scheduled" meeting with opponents "to listen to their concerns," he noted their argument that "requiring them to provide a document in a computerized form forces them to ***revise (or redact)*** certain documents so that confidential information is not included" and "this process will be costly and time consuming," but he expressed little sympathy for this argument. (LH:429 [Author's "Questions and Answers].) The meeting apparently changed his mind.

The author's June amendment (approved by the Senate in July and the Assembly in August) added §6253.9(b) as it now reads. (See, LH:33 ["Final History"]; LL:16-21 [Leg. Counsel Digest & Bill showing June revisions to AB2799].)[14] The added language was understood to provide that "the requester bear the cost of programming and computer services necessary to produce a record ***not otherwise readily produced***" (LH:17 [Leg. Counsel Digest]; accord, LH:170 [Com. Analysis].) Put differently, as the sponsor stated in a letter to the Governor, urging he sign the bill:

> *AB 2799 was amended on June 22, to ensure the bill would not place new burdens on state or local agencies. Specifically, the bill was amended to require the requester to bear the cost of producing a copy of an electronically held record [as set forth in the text of §6253.9(b)]. &* ***This provision guarantees the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester****, not the state or local agency.* (LH:358)

State agencies and departments read §6253.9(b) broadly. (See, e.g., LH:832 [DMV Enrolled Bill Report stating AB2799 clarifies that agencies "may charge the requester for producing a copy of a record, including the cost to construct a record as well as the cost of

[14] At the same time, §6253.2 was renumbered as §6253.9 because of conflict with another bill. (LH:404.)

programming and computer services.”]; LH:842 [State Pesticide Dept. Enrolled Bill Report, stating AB2799 “may create onerous tasks for those Department staff who must ***redact/delete*** protected information such as social security numbers, medical Information, names,” but “[t]his bill, as amended, provides for direct reimbursement and makes specific that requestor's will pay for programming time, albeit at the lowest programmer's pay level”]; LH:859 [Conservation Dept. Enrolled Bill Report, stating “Existing law provides … that the requester may be a charged a fee associated with the direct costs of duplication,” but “AB2799 specifies that direct costs shall include costs associated with duplicating electronic records,” and “[t]his would include costs of programming and computer services associated with compilation and extraction of a record”]; LH:900 [Finance Enrolled Bill Report, stating “the requester of information would bear the ‘direct cost’ of programming and computer services necessary to produce a record not otherwise readily produced,” and, “[t]herefore, any additional costs to the state would be paid by the requester” and local agencies could also “charge fees to cover those costs”].)

It was also understood that the June amendment could override *North County*, *supra*, 23 Cal.App.4th 144, with its limits on “direct costs of duplication,” in some circumstances. (See, LH:850-851, 853 [Water Resources Board Enrolled Bill Report explaining *North County*, with its limits on charges for producing copies of records “imposed an additional financial burden on agencies” but AB2799 requires “the requester bear the cost of programming and computer

services necessary to produce a record not otherwise readily produced," and, thus, it would have little "fiscal impact" on the Board (which, at any rate, gets "[v]ery few requested records [that] require redaction or reprogramming")]; LH:864, 868 [Water Resources Dept. Enrolled Bill Report, stating "under this bill some requesters would pay only the direct costs of duplicating a record in electronic format, while others would pay the entire cost of locating and producing a copy" and further stating AB2799 addresses opponents' "concerns" in that, among other things, "requesters must bear the entire cost of producing copies in circumstances where a copy is not readily available"].)

After the June amendment, nearly all opponents withdrew their opposition. (See, e.g., LH:227 [Sponsor's Letter, stating June amendment "removed all known opposition" except for Orange County]; LH: 211 [Clerks etc. Letter, withdrawing opposition after June amendment; LH:212 [State Sheriffs Assn. Letter withdrawing opposition after June amendment]; LH:303: [L.A. County Letter, stating June amendment "addressed its concerns"]; see also, LH:842 [Pesticide Dept. Enrolled Bill Report recommending the Governor sign AB2799 although it could require "onerous tasks," including having to "***redact/delete*** protected information" from electronic records because it provides for "direct cost reimbursement"].)

Orange County and some state agencies remained opposed to AB2799 despite the June amendment. (See, e.g. LH:168 [Orange County Letter after June amendment, stating providing records Ain

electronic format could require development of a new computer program to provide nonconfidential information in a report without also providing electronically the confidential information" or could require staff "go through each record to ensure that confidential information is not included in nonconfidential information," and "[e]ither method would be prohibitively expensive"] LH:225 [Orange County Letter, stating, even with June amendment, "County staff could be required to spend considerable time copying and editing [electronic] records"]; LH:817 [Memorandum to Governor, listing five State agencies and departments as opposed to AB2799 and stating it "could allow private entities to unilaterally direct the work that is performed by an agency to their benefit and could result in excessive state agency costs"]; LH:980 [Corporations "Supplemental" Report, stating recent amendments (including those related to costs) "resolve" the Department's concerns "except" its concern that the "physical nature of electronic records may complicate the 'reasonable segregation' requirement of the PRA, create confusion, and result in the accidental public disclosure of exempt information"]; LH:1072 [Consumer Affairs Dept. Enrolled Bill Report, stating, although agencies could charge "the cost of programming and computer services" to produce a record, "the provisions in this bill suggest that a requester's interest in obtaining copies of public records in a format requested outweighs an agency's interests in managing its workload" and, further, small boards with older equipment "may not have the capability to segregate disclosable information from the non

disclosable information," and, thus, ***redacting*** the information could be time consuming and divert staff resources that may be needed elsewhere"].)

These and other concerns about §6253.9 were not addressed in AB2799. (See, *Sierra Club, supra*, 57 Cal.4th at 174, stating the concern with inadvertent disclosure was not addressed.) But, given this legislative history, there should be no doubt that the Legislature addressed concerns about the cost of redacting electronic records by allowing agencies to recover this cost, that is, the Legislature intended "extraction" in §6253.9(b)(2) to encompass "redaction." Indisputably, the Legislature also understood that there were concerns about the burden and cost of removing non-exempt matter from exempt records to produce a new record and intended §6253.9(b)(2) to encompass this cost. (See, e.g., LH:308 [Analysis on Third Reading, stating "separating disclosable electronic records from nondisclosable electronic records could be a costly and time consuming process"]; LH:382 [Support Letter stating AB2799 "accommodat[es] the occasional extraordinary cost concerns involved in a request that requires . . . special programming to permit special data extraction"]; .LH:872-873 [Personnel Board Enrolled Bill Report, stating several AB2799 provisions "could be construed as requiring agencies to . . . create new records from data", but requesters could be required to bear the cost to so create new records]; LH:881 [Air Resources Bd. Enrolled Bill Report, stating "[u]nder this bill, private entities could request agencies to compile data in ways that meet the requestor's

needs," which could allow them "to unilaterally direct the work that is performed by an agency and could significantly increase state agency PRA workloads and costs"].) But there is simply no indication that the Legislature intended to limit "extraction" to this address this concern, as NLG and the court would have it.

CONCLUSION

Nothing indicates that the NLG and trial court's forced narrowing of the term "extraction" has any foundation. The provision §6253.9 says what it means. "Extraction" means taking something out. Taken in context with the statute as a whole, paper records and electronic records are to be differentiated-- they are distinct-- hence the inclusion of §6253.9.

But the legislative history, a history in which 'redaction' and 'extraction' are used interchangeably, closes the door as to any colorable debate about the meaning of the statute. The §6253.9(b)(2) provision was included, per the legislative record, according to the bill's authors, and as interpreted by agencies at the time of the bill's adoption, for the purpose of allowing the recoupment of the costs for segregating exempt information from an electronic record. It was made for situations like the one here. The City has appropriately invoiced its costs. And thus, the judgment must be reversed.

Dated: February 7, 2017

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Dated: February 7, 2017

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STATE OF CALIFORNIA
Court of Appeal, First Appellate District

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